

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

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of mailing

74-1238

To be argued by
BERNARD J. FRIED

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Pg 5

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-8058

UNITED STATES OF AMERICA,

Appellee,

—against—

STANTON FREEMAN, et al.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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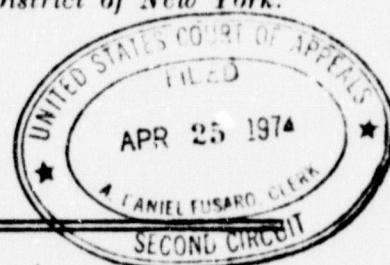




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United States Court of Appeals
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Docket No. 74-8058

UNITED STATES OF AMERICA,

Appellee,

—against—

STANTON FREEMAN, et al.,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Stanton Freeman, appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered January 4, 1974, following a six day nonjury trial.* Appellant was convicted of conspiracy to import approximately five (5) pounds of cocaine from Buenos Aires, Argentina, in violation of 21 U.S.C., Section 963. He was also convicted of three substantive counts of importation, possession with intent to distribute, and possession on board an aircraft in violation of 21 U.S.C., Sections 952(a), 841(a)(1), and 955.** Appellant

* On October 5, 1973 Chief Judge Mishler rendered a ten page written decision (Appellant's Appendix, pp. 1027-1036).

** Named as defendants along with appellant were Kim Ornitz, Marilene Tombini, Francisco Rudge, Hermano Albuquerque and Rosalys Rudner. As to these co-defendants: The charges against Ornitz were dismissed by the Court at the conclusion of the Government's case; Tombini and Rudge pleaded guilty prior to

was sentenced to concurrent terms of two years imprisonment and five years special parole on each count. Appellant is presently on bail pending appeal.

Appellant presses three claims on this appeal: (1) That the competent evidence was insufficient to prove his guilt beyond a reasonable doubt; (2) that it was error for the trial court to admit into evidence proof of his prior cocaine dealings; and (3) that the pretrial motion for suppression of evidence seized from appellant subsequent to his arrest should have been granted.

Statement of Facts

Co-defendant Francisco Rudge testified that he had travelled to South America in the early part of 1973 and learned that cocaine could be easily purchased in Bolivia for approximately \$2,500 per kilogram (383-84).* Prior to making any definite purchase arrangements, Rudge returned to New York and told George Morao, an unindicted co-conspirator who had previously supplied appellant with cocaine,** that cocaine could be purchased with ease in Bolivia. Morao replied "how easy it was to sell it [cocaine] in New York" (386).

Then in May, 1973, Rudge and Rosalys Rudner, with whom Rudge had been living for over a year (381), had a further conversation with Morao at which time Rudge told

trial to the "on board" count and were sentenced to three months and five years imprisonment respectively; the Albuquerque charges were dismissed prior to trial; and Rudner is currently a fugitive. Rudge and Tombini were witnesses for the Government. Ornitz was a witness for appellant.

* Page numbers in parenthesis refer to the trial transcript as reproduced in Appellant's Appendix.

** George Marao, a defendant in a separate indictment (73 CR 714), is currently a fugitive. During the events in question, he lived at the Albert Hotel in Manhattan (385).

Morao that he and Miss Rudner were considering purchasing the cocaine and could do so at the beginning of June (387).

According to Rudge, once the decision to import cocaine had been made, he went to London at the end of May, 1973 to enlist the aid of Marilene Tombini, a friend of two years, in the transaction. Tombini's role was to bring the cocaine from South America to New York (284-85, 390). Subsequently, on June 2, Tombini came to New York where Miss Rudner gave her money to purchase travellers checks and a round trip airline ticket from New York to Buenos Aires, Argentina (292). Co-defendant Tombini testified that she left for Buenos Aires on June 7 to wait there for Miss Rudner, who was to bring the cocaine from Bolivia, concealed in a suitcase. Miss Rudner arrived in Argentina on June 12, met Tombini at a hotel and delivered two suitcases containing the cocaine (298). That night the two women stayed in Tombini's room. On the following day, they returned to New York travelling together on the same airplane (300). Upon their arrival at John F. Kennedy International Airport on the evening of June 13, Tombini was arrested by Agents of the Bureau of Customs and the suitcases containing the cocaine were seized (308). Miss Rudner, however, was not apprehended.

The original plan, according to Rudge's testimony, was for Miss Rudner to follow Tombini through Customs in order to "see if anything was going to happen" (397). However, because Miss Rudner happened to be on a faster moving Customs line she was unable to see Tombini and did not see that she was arrested by the Customs agents. Miss Rudner waited outside the terminal for Tombini and finally left when Tombini failed to appear. She then went directly to the Hotel Albert, where Rudge was waiting. After he learned what had happened at the airport, Rudge put Miss Rudner in a cab and sent her to the Paramount Hotel where she registered in her own name (398).

After Miss Rudner left, Rudge met Morao at the Hotel Albert and told Morao that the "coke [had been] coming in; [and] that there was a possibility that the girl had been arrested." Morao was also told that Miss Rudner was at the Paramount Hotel (400). It was approximately two hours after this conversation with Morao that Rudge, himself, was arrested upon information supplied by Tombini (400).

On June 15, 1973—two days later—Michael Levine a special agent with the Bureau of Customs, learned that Rosalys Rudner had checked into Room 1815 at the Paramount Hotel on the morning of June 14th. Although only her bags were there, the hotel was nonetheless put under surveillance (89). It was three days later (June 18), according to the testimony of Rafael Duarte, the assistant manager of the Paramount Hotel, that he received a telephone call from the appellant, Stanton Freeman, inquiring about the person who was registered in Room 1815. Freeman, posing as a person named "Davis", stated: "I will pay whatever will have to be paid, but I want to pick up the baggage." Mr. Duarte testified that he recalled Freeman stating "my name is John Davis" (355-56).* The telephone conversation concluded with Duarte's instruction to Freeman that it would be necessary for Freeman to have identification before the baggage would be released to him.

John ("Jock") Spencer Davis, who had just recently arrived in New York from Colorado, had stayed at the Manhattan home of co-defendant Kim Ornitz on Friday, June 15, 1973. He had gone to Connecticut and returned to Ornitz's home on Monday, June 18, 1973. Davis testified that he telephoned Ornitz on Monday, at about 12:30 P.M.,

* It was conceded that appellant Freeman had made this telephone call (353), but appellant denied using the name "Davis" (627).

to advise that he would arrive that afternoon at approximately 4:00 P.M. (466-467).*

When Davis arrived, Ornitz suggested that they go downtown to meet Ornitz's girlfriend at a restaurant located near Times Square. Davis agreed and they went by subway to Times Square where Ornitz stated to Davis that if they visited Stanton Freeman's nearby club they "might be able to get a blow of coke" (466, 469). (It should be noted that Freeman, an entrepreneur in the entertainment business, testified that on June 13, 1973, he had opened two night clubs in the Hotel Diplomat [887, 889]).

Davis then went with Ornitz to the Hotel Diplomat where he met Freeman. Following a brief conversation about the club, Freeman asked Davis to excuse himself so that he and Ornitz could have a private conversation. After this private discussion was finished, Freeman and Ornitz rejoined Davis, who was in the hotel coffee shop, and all of them went into the hotel lobby. Davis testified that they all sat down and Freeman stated, "Jock, there is this chick who is hot and she is a cocaine smuggler and her bags are at the Hotel Paramount, which is four blocks away" (473). According to Davis, he asked Freeman how she was able to smuggle cocaine and Freeman replied, "She is a photography student and has a lot of equipment and somehow worked it out." ** Freeman told Davis that the girl's name was Rosalys Rudner, that her room number was 1815 and that the amount of her bill was \$54.27. Freeman further stated: "Now, I have arranged for a girl to pick them up, but if you can do it Jock, it would be great, and you can get something [cocaine] out of it" (473-74). Freeman stated

* When Davis left on Friday, Ornitz knew that Davis would probably be returning on Monday (813).

** Tombini testified that she (Tombini) had been a photography student (313). Moreover, Rudge testified that Rudner had helped him in his work as a photographer (401).

to Davis that "there is just a dash, maybe as much as five grams [of cocaine in the bags]." Davis, however, declined (475).

As they all walked out of the hotel, Freeman renewed the request. When Davis asked, "what is in it for me?", Freeman said, "We will have to see. I am not sure whether you will get \$400 and get high, whether one gram of cocaine and \$50, or a gram or just \$50, I am not sure" (475). Davis testified that he then agreed and that Freeman repeated the information concerning the hotel, this time adding that "the bags might have heat on them. They may be watched. So if you do get arrested, don't tell them anything about me, because of the people I know and a thing like this they can follow up, my friends and me, and they can find Rosalys Rudner and we are about ready to get her out of town" (476). Freeman further told Davis that, if it became necessary, he should use a cover story "that I had just met a man in the Hotel Diplomat, and that I was down and out for money, and he approached me and offered me a \$100 to pick up suitcases" (496).

Davis and Ornitz then left Freeman and went towards the Hotel Paramount. Ornitz, however, only went partway. Acting on Freeman's instructions, Davis entered the Paramount Hotel, presented identification, and was given the suitcases which belonged to Miss Rudner. Immediately thereafter he was arrested in Times Square (near the Paramount Hotel) and the suitcases were seized from him. Davis initially told the Customs Agents the false "cover" story which had been provided by Freeman. When it was obvious that this cover story was, as Davis put it—"unbelievable"—he told the agents that he had been sent by Freeman to pick up the two suitcases (497).*

* Ornitz, testifying as a defense witness, stated that after Davis exited the hotel it appeared that he was followed and that he (Ornitz) went to the Hotel Diplomat to warn Freeman (827).

Davis testified that after his "cover" story was disbelieved, he told the agents the truth and agreed to cooperate in an attempt to make a "controlled" delivery of the suitcases to Freeman (479). Thus, Davis took the bags to the Hotel Diplomat and went to the front desk to inquire about Freeman. He was sent to Freeman's office where he told Freeman that the "bags are here" (although Davis had left them at the hotel's front desk). Freeman asked Davis "Is there heat?" to which Davis replied "no". Freeman again asked about "heat" and finally told Davis that, "I will be right out to talk to you in a few minutes." Freeman, however, closed the office door and did not come out again (480).

After the unsuccessful attempt to deliver the suitcases, which were later found to contain a small quantity of cocaine and some cocoa leaves (79), the Agents brought Davis and the suitcases to Freeman's office. Freeman was given the *Miranda* warnings and then, with Davis present, he was told that Davis had stated that Freeman had sent him for the suitcases. Freeman first stated that he "had never seen Mr. Davis before in his life" (55), and then stated, "Well, a few moments ago he poked his head in the door and he asked for someone" (601). Freeman denied knowing Rosalys Rudner and stated he could not identify photographs of her that were shown to him. Freeman also stated that he did not know any Brazilians and that he did not know anyone who lived at the Albert Hotel (George Marao's residence) (601-02). Agent Levine told Freeman that they had reason to believe that he (Freeman) had sent Davis to the Hotel Paramount to pick up the bags belonging to Rosalys Rudner, a fugitive. Freeman replied that he had "no knowledge of this whatsoever" (602). Although Freeman admitted knowing Ornitz, he initially denied seeing him that day. He then stated he had just seen him but for a very short time (603). After Davis was taken from the Hotel Diplomat, the agents had a further conversation with Freeman advising him to give whatever information he

had because their primary concern was finding the fugitive, Rosalys Rudner (603-604, 59-60).

The following day, June 19, pursuant to an arrest warrant issued by the United States Magistrate for the Eastern District of New York, Freeman was arrested and taken to Customs Headquarters, 201 Varick Street, New York, New York, where he was processed, advised of his rights, provided with dinner, and questioned. Freeman initially maintained that his original statements were true (606). Nevertheless, when certain seized documents were shown to him, he retracted some of his initial statements.

At the time of Freeman's arrest a briefcase was seized from him and Freeman was shown a travel folder, bearing the name "Theresa Terezinha De Jesus Silva Brandao Costa", that had been inside this briefcase (Government Exhibit 3; 66). Freeman then declined to answer further questions until his attorney, William London, Esq., arrived. After Mr. London arrived, Freeman explained that Ms. Costa was someone for whom he had obtained a lawyer for an immigration hearing but that he did not actually know her (612). Freeman said that a Brazilian, whom he knew, although not as a "good friend", and whose name was George Simon,* had called him about Ms. Costa. Freeman stated that he had not spoken to George for several months. But when Freeman was confronted with an envelope (Government Exhibit 4), postmarked May 19, 1973, that was taken from his briefcase and which had the name "George" and a telephone number "677-0100, Ext. 282" (The Albert Hotel phone number) written on it, Freeman's response was that "he was not sure, he was a little confused". Freeman again was shown the photographs of Rosalys Rudner and he again denied knowing her (70-71). At this point, Freeman's attorney terminated the questioning (608).

* Actually, George Morao.

David Duffy, a friend of Morao, testified as to events that took place during the period between the June 13th arrests of Tombini and Rudge and the June 18th arrest of "Jock" Davis. According to Duffy, at about midnight on June 13, 1973, Morao had come to his home and told him that "a friend of his had been arrested at Kennedy Airport, with some cocaine" and sought Duffy's help in locating a lawyer. After Duffy tried unsuccessfully to contact a lawyer, Morao left (409-10). The following day, June 14, Duffy went to Freeman's house, located at 61½ Perry Street, Greenwich Village, New York, to pick up one Theresa Costa, George Morao's wife, in order to accompany her to an immigration hearing. Duffy testified that he had gone to Freeman's house because Morao had told him to meet Theresa there. Duffy saw Theresa Costa, her baby, Rosalys Rudner and George Morao (414).

Duffy testified that he returned to Freeman's home on June 16, 1973, and saw both Morao, and Freeman (454). At this time, Miss Rudner came downstairs into the kitchen and then went back upstairs (430). Duffy stated that he and Morao discussed the possibility of "get[ting] the chick out of the country" (455) across the Vermont border to Canada and that at their request Freeman gave him and Morao some maps (456).

Duffy further testified that on Monday, June 18, 1973 at about 1:00 p.m., he returned to Freeman's home where he again saw Miss Rudner and Morao. However, Duffy did not "believe" that Freeman was then at home (432-433).

Special Agent Silvestro, of the Bureau of Customs, testified that on August 16, 1973, almost two months after Freeman was arrested, Freeman gave a statement in which he admitted, among other things, that Rosalys Rudner had been at his (Freeman's) house on June 16, 1973, having been brought there the previous evening by Morao (618). Freeman, however, stated that she had left on June 16, 1973 and that he had never seen her again (621). According to Freeman's

August 16th version of the events, as related by Agent Silvestro, the following occurred: On June 8 he had received a telephone call from George Morao, a Brazilian acquaintance of his who had just returned to the United States. Freeman, at that time, invited Morao, Morao's wife Theresa, and their infant child to stay at his (Freeman's) house but they declined his invitation. Freeman said that on either the evening of June 14 or during the day of June 15, after he had already seen Morao and his wife socially, they came to his house with their baby and without any luggage and asked to stay. Freeman allowed them to do so. Freeman, who was then working very long hours, performed, according to his statement, "favors" for them. Thus, he went to Morao's lower East Side loft to pick up camera equipment. He later went to the Albert Hotel where they still maintained their room and "paid some money on the hotel bill of George Morao and Terezinha Costa and retrieved some of their luggage" (620, 652). On Saturday, June 16th, while Miss Rudner was at his home, Freeman arranged for a barber to come and cut her hair (626). Freeman stated that he left his home on the evening of June 16th accompanied by Miss Rudner and Morao and dropped them off at Second Avenue and Fourth Street as he was enroute to his nightclub in a taxicab. He stated that he never saw Miss Rudner again (621).

In his August 16th statement, Freeman further admitted that on Monday, June 18, he had telephoned the Paramount Hotel to inquire about Rudner's luggage but denied that he had used the name Davis. He said that he had made the call at the request of Morao. Freeman also agreed to try to arrange to have Miss Rudner's luggage picked up (622-23, 693). According to Freeman, he went to the Hotel Diplomat that afternoon, asked one Brad Strange to pick up the luggage * but that he happened to meet Ornitz and Davis.

* Brad Strange testified for the defense that Freeman had called and asked him to come to the Hotel Diplomat but when he arrived Freeman said "forget about it, it's already been taken care of" (781-82).

Freeman told Davis about the luggage, adding that there might be a small amount of cocaine in the bags but that he thought they might be "hot" (624). Davis agreed to do the errand and Freeman gave him \$60 for the hotel bill (625). Freeman stated that immediately after the agents had left the Hotel Diplomat, after they confronted him with Davis on June 18th, "he dialed his home telephone number and the phone was answered by someone whom [he] believed to be George Morao, and he said the single word, 'split', and hung up the phone" (716). At home later that evening, Freeman received a call from Theresa, and in a cryptic manner "indicated to her that she needn't bother to call him or contact him any more" (717).

Agent Silvestro added that on August 16, 1973, Freeman admitted that "he had purchased small amounts of cocaine from Mr. Morao and had himself sold or transacted small amounts of cocaine as merely a business accommodation . . . in the music and night club industry, and some of his cocaine was cocaine that he had gotten from Mr. Morao" (626). Freeman stated that "he knew from prior experience with George that George sold drugs" (674). Moreover, Ornitz testified, as a defense witness, that Freeman had been a source of cocaine, stating that: "If I needed some cocaine or whatever, and it was around, Stan and I had both purchased cocaine from George [Morao]. I guess it was through George. You know, sometimes George couldn't be there. Sometimes I—I had no idea where it came from" (837-38). At one time, Ornitz had seen Morao turn over approximately an ounce of cocaine to Freeman (842). Ornitz testified that he "never bought anything directly from George [Morao]. George wouldn't talk to me." He was asked to whom George would talk and he replied that, "George would talk to Stan" (838).

Mark Etra, who had pleaded guilty in September, 1973 to an indictment charging conspiracy to import cocaine (538), testified that Freeman approached him (Etra) in

September, 1971 and said he "would be interested in obtaining large quantities of cocaine, if that was possible, that I could deliver such quantities to him, on a fairly regular basis" (543). They were "referring to kilos of cocaine" and discussed price and quality (547-548). Etra delivered a sample to Freeman—one or two grams (543, 545), but there was never any purchase from Etra (613, 376).

Appellant testified in his own behalf. Because his testimony as well as that of the other defense witnesses is accurately set forth in Appellant's Brief, further elaboration seems unnecessary.

ARGUMENT

POINT I

The evidence below was sufficient to establish appellant Stanton Freeman's guilt beyond a reasonable doubt.

Appellant urges two interrelated claims: that there was insufficient competent evidence to prove his guilt, and that his guilt was not proven beyond a reasonable doubt. It is submitted that an examination of the trial record will demonstrate that the evidence was sufficient to support Chief Judge Mishler's findings that:

- (1) [T]he defendant Stanton Freeman entered the conspiracy alleged in the indictment at the commencement of the term of the conspiracy and that the conspiracy continued until the time of his arrest on June 19, 1973[; and]
- (2) When he entered the conspiracy he understood his role to be that of a purchaser of cocaine from Morao for the purpose of distributing the cocaine to users. He knew that the cocaine was to be imported from

South America. He entered into the conspiracy with intent to violate Federal Narcotics Laws. At the time he entered the conspiracy he not only knew Morao but he also knew that other participants in the conspiracy purchased narcotics in South America, that they imported narcotics into the United States, and that such importation was illegal (1035-1036).

Initially it should be noted that the scope of review of a conviction following a non-jury trial does not differ from the scope of review following a jury verdict: "The test is whether, taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict". *United States v. Tutino*, 269 F.2d 488, 490 (2d Cir. 1959). Thus, at the outset, it seems appropriate to note and to reject the thread running throughout appellant's brief that it was somehow—though not expressly stated to be—improper for the trial judge to have resolved conflicts in favor of the Government.* It is, of course, basic that where the trial judge chooses to credit the testimony of one witness the Appellate Court must accept that witness' version. *United States v. Grandi*, 424 F.2d 399, 401 (2d Cir. 1970).

The Government's theory of the case is simple: Tombini, Rudge and Rudner were the importers; Morao, the wholesaler; and appellant Stanton Freeman, the middle man and retailer. And though all did not know each other, the operation may be traced from Rudge through Morao to appellant Freeman. Freeman's participation in the conspiracy however, as will be seen, was proven by inferences from various pieces of circumstantial evidence, as "it is usual and often necessary in conspiracy cases" *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

* For example, the footnote on p. 62 of Appellant's Brief, wherein it is contended that the trial judge "improperly adopted the testimony of Agent Silvestro". See, also, Appellant's Brief, p. 68.

Appellant contends that it was not proven that Morao was a member of the conspiracy. Rather, the argument goes, all that was shown was an "association" with Rudge and nothing else (App. Br. p. 58). This contention ignores the evidence which established that prior to Rudge's making arrangements with Tombini and Rudner to physically import the cocaine, that he had had two separate conversations concerning the distribution of the cocaine in the United States—with Morao. Thus, Rudge's testimony that he "had a person (Morao) that was telling me that he knew of a way of disposing of it [the cocaine]" (336) coupled with Rudge's further testimony that he had told Morao that "I would do it at the beginning of June" (387), thoroughly warranted the trial court's finding that Morao and Rudge had entered into an agreement and that, as Chief Judge Mishler found, "[i]t was decided to arrange for the importation in June" (1028).

It seems clear from both conversations that Morao was involved in the conspiracy and was not merely "associating" with the Brazilians. There was a "working relationship" between them. *United States v. Cassino*, 467 F.2d 610, 617 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973). Buttressing this inference is the act of Rudge, immediately after he learned that Tombini was probably arrested, of seeking out Morao, telling him that there had been "some coke coming in", obviously the cocaine that they had expected, and informing Morao that he had just sent Rudner to the Paramount Hotel (399-400). It would, of course, be simpler had the agreement been more explicit but, as this Court stated in *United States v. Cassino, supra*:

[I]n real life, conspiracies are not so easily identified. It would be a rare case in which the conspirators assembled together and planned to bribe State officers. The law has taken cognizance that conspiracies are not so born. It permits inferences of their existence to be drawn from the conduct and speech of the actors. (*Id.* at 617.)

It is also argued that there was a complete failure of proof as to appellant's participation in the conspiracy as of June 13, 1973, the date the cocaine was seized.

Appellant urges that the evidence as to his post June 13 conduct shows only, if anything, that he aided in the concealment of Miss Rudner and is otherwise irrelevant to proving his participation in the conspiracy. In support of this contention appellant relies on *Krulewitch v. United States*, 336 U.S. 440 (1949) and *Grunewald v. United States*, 353 U.S. 391 (1957). This contention fails, however, for the simple reason that appellant's in depth involvement with the events following Tombini's arrest was not adduced under the co-conspirator's exception to the hearsay rule contrary to *Krulewitch v. United States, supra*, nor was there an attempt to extend the statute of limitations as in *Grunewald v. United States, supra*. The evidence was the product of appellant's own conduct and words.

Moreover, appellant ignores the governing decision, *Lutwak v. United States*, 344 U.S. 604 (1953), where the Supreme Court, analyzing the *Krulewitch* case, held that although the co-conspirator exception to the hearsay rule does not allow admission of declarations made after the conspiracy has ended, "acts, being relevant to prove the conspiracy, were admissible, even though they might have occurred after the conspiracy ended" (emphasis in original) (*Id.* at p. 618). See, also, *United States v. Bennett*, 409 F.2d 888, 892 (2d Cir.), cert. denied, 396 U.S. 852 (1969). Certainly, even taking appellant's argument on its own terms—that the conspiracy ended on June 13 *—the evidence

* However, at trial, Rudge testified that according to the plan, Miss Rudner was to follow Tombini through Customs "so she could see if anything was going to happen, but her line was moving too fast, and she had to go through first". Rudner then waited outside but "Tombini never appeared" (397). From this evidence, it is proper to infer that the co-conspirators had entered prepared for the eventuality of discovery and that such prepara-

of Freeman's "post-conspiracy activity was admissible because it was probative of the existence of a conspiracy or the participation of the alleged conspirator" *United States v. Nathan*, 476 F.2d 456, 459-460 (2d Cir. 1973). See, also, *United States v. Costello*, 352 F.2d 848, 853-854 (2d Cir. 1965).

Appellant argues that there was insufficient evidence to prove guilt beyond a reasonable doubt and analyzes the various pieces of evidence in isolation. However, as this Court stated in *United States v. Dardi*, 330 F.2d 316, 325 (1964): "microscopic dissection of bits and pieces of evidence when laid out in a cold record overlooks the truism that 'logically the sum is often greater than the aggregate of the parts, and the cumulation of instances . . . may have a probative force immensely greater than any one of them alone'" (omission in original). See, also, *United States v. Jenkins*, — F.2d — (2d Cir.), slip op. 2691, 2705-2706, decided April 4, 1974; *United States v. Colabro*, 449 F.2d 890 (2d Cir. 1971), cert. denied, 405 U.S. 928 (1972); *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

Freeman, when initially questioned, denied any and all involvement in this case. He maintained his denials when arrested the following day and then, on August 16, 1973, almost two months after his arrest, admitted a limited participation—a participation he maintained was concerned solely with Rudner as a favor to his friend George Morao—a position he adhered to at trial. Thus, the dispute focuses

tion would have necessitated the remaining co-conspirators helping each other to flee from the authorities. This is precisely what occurred. Consequently, the conspiracy itself continued past the frustration of the aims of the conspiracy. *United States v. Perrone*, 161 F. Supp. 252, 259 (S.D.N.Y., 1958). In addition, the conspirators' contemplation of concealment was shown by the false "cover story" that appellant provided to Davis as part of the inducement to have Davis retrieve Miss Rudner's baggage from the Paramount Hotel.

on certain interstitial facts. And, it is those facts, together with the undisputed ones, and the inferences that they support that warranted the finding that Freeman was a knowing participant in the conspiracy.

Freeman's initial false exculpatory statements evidenced a consciousness of guilt, *United States v. Smolin*, 182 F.2d 782, 785-86 (2d Cir. 1950), which was not dissipated by his subsequent explanation, inasmuch as he admitted warning George to "split" immediately after he was questioned. This act, in and of itself, permitted the inference of guilty participation, further strengthened by his original false disclaimer of any knowledge.

Freeman's subsequent admission that he sent Davis for the bags is similar to the Davis testimony except that he significantly denied having told Davis that the girl was a cocaine smuggler who was hot and whom he and his friends were then ready to get out of town. He also denied that he told Davis that as a photography student she was somehow able to smuggle cocaine. Davis could only have learned from Freeman that the conspirators were involved in photography. Indeed, Tombini testified that she had studied photography (313) and Rudge testified that Rudner had helped him in his work as a photographer (401). Add to this the acknowledged "cover story" that appellant provided Davis and consider that Davis, concededly, had been told by Freeman that the bags were being watched and the inference of knowledge is inescapable. Moreover, all of this evidence,*

* It should be recalled that Duarte, the Assistant Manager of the Hotel Paramount, testified that he had received a telephone call from a person, later identified to be Freeman, that a "David or Davis" would pick up the bags (356). This call was placed prior to the time John Spencer Davis arrived in New York and after his phone call from Connecticut. The only inference possible is that Freeman, advised by Ornitz that Davis was enroute, "set" Davis up for the delivery. The Brad Strange testimony is consistent: in the event Davis would not or could not go, Freeman had, as he indeed testified, and as Davis so testified, arranged for an alternate.

including that Freeman gave Davis the money for the Hotel Paramount—expecting to be repaid by Morao to whom he had never previously loaned money—must be viewed in light of Freeman's trial testimony that during the eighteen months he had known Morao the only favor he ever did for him was to bring him food for his baby (994).

The fugitive Rudner, whom Freeman at first denied knowing, was at his house from June 14, 1973 (the day after Tombini was arrested at J.F.K.) to June 18, 1973 (the day that Freeman sent Davis for her bags), although Freeman said she was only there on June 16, 1973. According to Duffy, he saw Rudner at Freeman's house on June 14, June 16, and June 18, 1973 giving rise to the inference that she was more than just Freeman's overnight house guest. The significance of this is apparent: Freeman attempted to minimize the effect of the guilty inference to be drawn from Rudner's stay of four days *—during which Freeman arranged for a barber to come to his home to give Rudner a haircut. And also during which time, Freeman, who had been very busy with the opening of his nightclub, found time, again as a mere favor, to pick up the luggage from the Hotel Albert and to go to the loft for the lens and other papers. Certainly, Rudner's lengthy stay, measured against the Freeman denial, serves to support the inference that Freeman was actively and knowingly participating in the efforts to "get" Rudner out of town—which is what he told Davis—to prevent disclosure of the conspiracy. Freeman's unguarded trial comment is revealing—he stated that "no one in the world knew that this girl was staying at that hotel" (967). How could he have been so confident without full knowledge of what had transpired? **

* An inference strengthened by the fact that Morao and his family were also house guests during this period.

** Another trial comment of Freeman is worthy of note. Freeman, describing the meeting with Ornitz and Davis stated: "And Kim and I went into the lobby and I told Kim what my problem was . . ." quickly realizing what he had said, Freeman added ". . . not mine but George's problem" (955).

Both through admissions and independent evidence Freeman was shown to have had recent prior dealings in cocaine with Morao, obtaining cocaine from him for resale to others. Also, the evidence showed that in September, 1971, Freeman had attempted to arrange for regular deliveries of large quantities of cocaine through Mark Etra. Certainly, the fact that Freeman was not an infrequent customer of Morao and the presumption that Freeman knew that the cocaine was illegally imported provided sufficient basis for assuming that Freeman knew Morao to be a middle man in cocaine importation. Compare, *United States v. Aviles*, 274 F.2d 179, 189-90 (2d Cir. 1960).

Here, as this Court said in *United States v. Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962) "each of the . . . episodes gained color from each of the others". The prior dealings with George; the earlier attempt to establish a cocaine connection; the initial false exculpatory statements and the subsequent limited admissions; the suspicious circumstance of Morao and his family moving in with Freeman while retaining their room at the Hotel Albert; the picking up of Morao's and Theresa's bags at the Hotel Albert and the picking up of the lens and papers at the loft; the four day stay of Rudner at his house, the obtaining a barber to cut Rudner's hair at his home; the phone call to the Hotel Paramount; the agreement to get the bags for Morao *after* he knew that they might contain cocaine and might be watched; the solicitation of Davis to get the bags and telling Davis that the bags belonged to a "hot" cocaine smuggler, a photography student, whom he and others were getting out of town; the providing to Davis of a cover story in case he was arrested so the police could not trace "my friends and me" (476), the furnishing of his own money for the bags when he had never before loaned Morao money; the immediate warning telephone call to Morao, and the final warning to Theresa, all support the inference that Freeman was a knowing participant in the

conspiracy charged. Indeed, as this Court has observed, although in a different context, "it is difficult to see how any other inference can be drawn in this case". *United States v. Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972).

POINT II

The admission of evidence of a prior similar act was not error.

Appellant contends that it was error to admit the testimony of Mark Etra that Freeman had previously sought to establish a regular source for large quantities of cocaine because it was too remote. This evidence, however, was properly admissible to prove the organization, structure and method of operation of the conspiracy, *United States v. Stadter*, 336 F.2d 326, 328-29 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965), and to prove appellant's motive, his knowledge and his intent. *United States v. Brettholz*, 485 F.2d 483, 487-88 (2d Cir. 1973); *see, also*, *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967).

The evidence, that appellant sought to develop a source of kilogram quantities of cocaine, is not as asserted by appellant, too remote. At trial the Government established that it was at about that time that Freeman met Morao, who then became a supplier of cocaine for Freeman. Consequently, the Etra testimony was proper, under the law of this Circuit, inasmuch as it "related in a reasonable way to the particular crime charged" *United States v. Vario*, 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 867 (1974). Moreover, because the instant case was not tried before a jury, the danger that the "jury will be roused by the evidence to overmastering hostility", *United States v. Brettholz*, *supra* at p. 487, was non-existent.

POINT III

The District Court correctly denied appellant's pretrial motion to suppress evidence seized from him subsequent to his arrest pursuant to an arrest warrant.

Appellant's final contention, that the search was unlawful is without merit and may be treated summarily.

Appellant was lawfully arrested on June 19, 1973, pursuant to an arrest warrant issued by the United States Magistrate for the Eastern District of New York. Examination of the affidavit* submitted to Magistrate Vincent A. Catoggio shows that the Magistrate was "supplied with sufficient information to support an independent judgment that probable cause exist[ed] for the warrant". *Whitely v. Warden*, 401 U.S. 560, 564 (1971).

* This affidavit, executed on June 19, 1973 by Special Agent Michael Levine provides in relevant part:

1. Seizure of approximately 5 pounds of cocaine from the possession of Marilene Tombini upon her arrival at John F. Kennedy International Airport on June 13, 1973 by aircraft from Buenos Aires, Argentina.
2. Field test showing the said substance to be cocaine.
3. A written statement by Marilene Tombini to agents of the Bureau of Customs in substance admitting that she had knowingly imported the cocaine with Rosalys Rudner from Argentina and that this had been arranged by Francisco Rudge.
4. Seizure of part of a baggage check allegedly belonging to Rosalys Rudner from Hermano Albuquerque.
5. A statement made to your deponent from the Manager of the Hotel Paramount, New York, N.Y. that Rosalys Rudner checked into a room in said hotel and failed to return to claim her baggage which was then taken into the custody of the said hotel manager. Observations of this suitcase revealed the other part of Rosalys Rudner's baggage check.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

April 23, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
BERNARD J. FRIED,
Assistant United States Attorneys,
Of Counsel.

6. A further statement from the manager of the Hotel Paramount that a person had called stating in words to the effect that he was to pick up this suitcase.
7. Surveillance by your deponent and other Special Agents of the Bureau of Customs which revealed that the defendant John Spencer Davis picked up the aforementioned suitcase and paid the hotel bill of the aforementioned Rosalys Rudner. A seizure of this suitcase from the defendant John Spencer Davis which suitcase contained a quantity of cocaine.
8. A false exculpatory statement by the defendant John Spencer Davis concerning why he picked up Rosalys Rudner's suitcase.
9. A statement by the defendant John Spencer Davis to your deponent that he was instructed by the defendant Stanton Freeman to pick up Rosalys Rudner's luggage at the Hotel Paramount, New York, New York.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 24th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~as two copies of brief for the appellee~~ of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Myron Beldock, Esq.

565 Fifth Avenue

New York, New York 10017

Sworn to before me this

24th day of April 1974

Sylvia E. Morris
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen
Deborah J. Amundsen

SIR:

PLEASE TAKE NOTICE that the within
will be presented for settlement and signa-
ture to the Clerk of the United States Dis-
trict Court in his office at the U. S. Court-
house, 225 Cadman Plaza East, Brooklyn,
New York, on the ___ day of _____,
19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

Action

No.

**UNITED STATES DISTRICT COURT
Eastern District of New York**

Eastern District of New York

—Against—

To:

Attorney for

SIR;

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the ____ day of

-----, in the office of the Clerk of the U. S. District Court for the Eastern District of New York.

Dated: Brooklyn, New York

19

United States Attorney,
Attorney for

To:

Attorney for

Attorney for

FBI:LC:SM:R:73-7388

